No. 20-1102

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLARENCE MOSES-EL,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF DENVER, MITCHELL R. MORRISSEY, BONNIE BENEDETTI, ROBIN WHITLEY, LYNN KIMBROUGH, JEFF CARROLL, DR. KATHREN BROWN-DRESSEL, THE ESTATE OF JAMES HUFF,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Colorado
The Honorable, Marcia S. Krieger, Senior Judge
D.C. Case No. 17-cv-03018-MSK-NRN

BRIEF OF *AMICI CURIAE* DISABILITY AND CIVIL RIGHTS ORGANIZATIONS THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, COLORADO CROSS-DISABILITY COALITION, DISABILITY RIGHTS ADVOCATES, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND PUBLIC JUSTICE

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae disability and civil rights organizations share a commitment to ensuring that courthouse doors remain open to all injured plaintiffs with meritorious claims. *Amici* understand the important role of the civil justice system in protecting the rights of and preserving avenues of redress for those who are the victims of corporate and governmental wrongdoing. In particular, they have tracked developments in the law regarding the Rule 8 pleading standard, including courts' application of the Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). They are concerned that the district court's decision in this case goes farther than those two cases and, if left to stand, would raise barriers to entry to the courthouse too high for litigants, including their clients, and would undermine access to justice in contravention of the Federal Rules of Civil Procedure and Supreme Court jurisprudence.

Descriptions of individual *Amici Curiae* are set forth in the Appendix.

All parties have consented to the filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent

corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

STATEMENT PURSUANT TO FED. R. APP. P. 29(C)(5)

No party, party's counsel, or other person authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

For nearly a century, it has been a fundamental tenet of American jurisprudence that the courthouse doors should be easy to enter. The success of a case should depend on its merits, not the sophistication of its pleadings. For that reason, Rule 8 of the Federal Rules of Civil Procedure provides that to get into court, a plaintiff need only offer a "short and plain statement of the claim," such that it "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and alteration omitted). On a motion to dismiss, courts must assume that the factual allegations of a complaint are true. *See id.* A complaint is sufficient so long as it states a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This "plausibility standard is not akin to a probability requirement." *Id.* at 678 (internal quotation marks omitted); *Cf. id.* at 696 (Souter,

J., dissenting) ("*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true.").

The district court's decision in this matter subverts this pleading standard. Here the district court erroneously dismissed Mr. Moses-EL's claims of malicious prosecution against Defendants Brown-Dressel and Huff, finding that Mr. Moses-EL failed "to adequately allege facts, which if true, would establish the requisite *mens rea* – malice." JA4 at 854. The court said it "is not enough to plead facts that are 'merely consistent with a defendant's liability' – that is, facts that would permit many possible inferences, only one of which is the inference urged by the plaintiff," but that Mr. Moses-EL must, through his pleadings, "*dispel the possibility* that the defendant acted with mere negligence." *Id.* at 854-55 (emphasis added); *see also* JA6 at 1263. Discussing the claims against Dr. Brown-Dressel, the court below, contrary to the Supreme Court's explicit language, said "*Iqbal* requires Mr. Moses-EL to plead facts that establish a probability, not a possibility, that Dr. Brown acted with malice against him." JA4 at 857 (emphases in original)).

If left to stand, the district court's decision would upend longstanding principles and raise the threshold for entry to the courthouse impermissibly high for too many litigants. According to the district court, it is not enough for a plaintiff's claims to be plausible; the plaintiff must "dispel" all other possibilities and make out claims that are *more* plausible than any possible alternative

explanation the defendant might offer. *Id*. at 855. If the plaintiff does not dispel all other possibilities through his pleading, the complaint must be dismissed without even requiring an answer.

Such a standard has no basis in the Federal Rules or Supreme Court jurisprudence. At the pleading stage, courts are not permitted to dismiss a plausible claim simply because they believe a defendant's explanation may be more plausible. Indeed, the Supreme Court in both *Twombly* and *Iqbal* specifically disapproved of imposing a "probability" standard at the pleading stage. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. Amici urge this Court to follow the Supreme Court's explicit direction and reject the barrier to enter the courthouse doors the district court attempted to erect here.

ARGUMENT

I. Rule 8 requires that a plaintiff state a claim to relief that is plausible on its face.

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint is sufficient if it provides a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). For fifty years, courts' understanding of this rule remained essentially unchanged. Under the Supreme Court's decision in *Conley v. Gibson*, a complaint satisfied the rule as long as it provided notice to the defendant of the nature of the lawsuit. 355 U.S. 41, 47-48 (1957). A motion to dismiss the complaint would not be granted "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set

of facts in support of his claim that would entitle him to relief." *Id*. at 45-46. Such motions were to be invoked only in those rare cases in which no viable legal theory supported a plaintiff's claim.

The Supreme Court's decisions in *Twombly* and *Iqbal* changed the understanding of Rule 8's pleading requirements for the first time in five decades. The Court "retire[d]" *Conley*'s language holding that a motion to dismiss should be granted only where "the plaintiff can prove no set of facts" demonstrating a defendant's liability. *Twombly*, 550 U.S. at 563 (internal quotation marks omitted). Instead, the Court held, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570; *Iqbal*, 556 U.S. at 697.

It is an understatement to say the introduction of plausibility pleading was controversial. Courts—including this one—and commentators have expressed confusion and even consternation at the Supreme Court's formulation. *See, e.g.*, *Robbins v. Okla. ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid."); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 43-44 (1st Cir. 2013) (application of plausibility pleading in antitrust context "has elicited considerable confusion"); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 31 (2010)

("[I]nconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers.").

Courts have "struggl[ed]" to determine how high the Supreme Court "meant to set the bar" when it held that claims must be plausible—and whether the plausibility standard heralds a departure from its previous pleading decisions, which it did not purport to overrule. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010); *see, e.g.*, *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 & n.2 (10th Cir. 2012) (noting "disagreement" and "confusion" as to whether plausibility standard "requires minimal change or whether it in fact requires a significantly heightened fact-pleading standard"); *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) ("To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know . . . whether we should apply the more lenient or the more demanding standard."). Even the Justices of the Supreme Court have appeared to disagree about what standard is required. *See Iqbal*, 556 U.S. at 688 (Souter, J., dissenting) (after authoring the majority opinion in *Twombly*, Justice Souter dissented in *Iqbal*, saying the *Iqbal* majority "misapplies the pleading standard under" *Twombly*).

Iqbal and *Twombly* have also earned substantial academic attention. Many have criticized the decisions for potentially altering the meaning of the Federal Rules outside the procedures contemplated by the Rules Enabling Act. *See, e.g.*, Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 Akron L. Rev. 1189, 1190 (2010); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 Geo. Wash. L. Rev. 9, 28-29 (2009); Miller, *Double Play*, *supra*, at 84-89; Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev. Lit. 313, 334 (2012).

Others have lamented that the plausibility standard is vague and difficult to apply. *See, e.g.*, Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. Ill. L. Rev. 1011, 1059 (2009) ("The Supreme Court's plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard."); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 Wash. U. L. Rev. 455, 468 (2014) ("The overly subjective and vague nature of the test fails to properly guide judges.").

And some commentators have expressed concern that if *Twombly* and *Iqbal* are interpreted to require district courts to evaluate plaintiffs' factual allegations,

they may raise constitutional concerns by arrogating to judges decisions the Seventh Amendment commits to a jury. *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 Minn. L. Rev. 1851, 1869-70 (2008); Kenneth Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 Neb. L. Rev. 467, 471-72 (2010).

But ultimately, *Iqbal* and *Twombly* did not effect an earth-shattering change in the way claims should be pleaded. With the exception of retiring *Conley*'s "no set of facts" language, they did not overrule the Supreme Court's previous cases. They disclaimed any intention of imposing a heightened fact pleading standard. *Iqbal*, 556 U.S. at 678 (holding Rule 8 "does not require 'detailed factual allegations. . . .'" (quoting *Twombly*, 550 U.S. at 555)). And they did not alter the basic rule that a complaint is sufficient so long as it provides "a short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted).

At the pleading stage, plaintiffs still need not provide "detailed factual allegations" or counter every possible argument a defendant might make. *Twombly*, 550 U.S. at 545. And courts at the pleading stage may not dismiss a claim solely because they believe it unlikely to be proven. *See id.* at 555-56. Under these modern pleading standards, so long as a claim is, in fact, plausible, it may stand.

II. The district court's pleading standard has no basis in Supreme Court case law.

The district court in this case applied a different, and unsupported, standard to dismiss Mr. Moses-EL's claims. If left to stand, the rule the district court applied would sanction district courts' evaluation not only of the plausibility of the plaintiff's claim on a motion to dismiss, but also the plausibility of any competing explanations offered by the defendant. It is not enough, according to the district court, for a plaintiff's claim to be plausible. *See, e.g.*, JA4 at 855, 857. It must be *more* plausible than any other possible explanation for the facts alleged. *See id*. The Supreme Court has explicitly rejected that contention.

Both *Twombly* and *Iqbal* make clear that "[t]he plausibility standard is *not* akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556 (emphasis added)). The claim that a defendant acted illegally need not be the most likely explanation for the facts alleged in the complaint. *See id*. It need only be a "plausible" one. *Twombly*, 550 U.S. at 545.

The district court here attempts to circumvent this principle by redefining the term "plausible." It asserts that a plaintiff's claims are not "plausible" unless they are more plausible than, and indeed "dispel," any other explanation. JA4 at 855. But that is simply another way of saying a claim is only plausible if it is probable—precisely the idea the Supreme Court has already rejected. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556.

To be sure, in *Twombly* and in *Iqbal*, the Supreme Court dismissed complaints because the only facts the plaintiffs alleged to support their claims had an "obvious" lawful explanation. *Iqbal*, 556 U.S. at 682 (internal quotation marks omitted); *Twombly*, 550 U.S. at 567. Taken out of context, these statements may suggest that courts should weigh the parties' competing claims at the pleading stage—that judges should determine, without any evidence upon which to base their decision, whether it's more likely that a defendant acted illegally (as the plaintiff claims) or lawfully (as the defendant may claim). But a closer examination of *Iqbal* and *Twombly* makes clear the Supreme Court held no such thing.

In *Twombly*, the plaintiffs claimed that several regional telephone carriers unlawfully agreed to prevent other phone and internet companies from competing with them. *Twombly*, 550 U.S. at 550–51. The plaintiffs' sole factual allegation supporting this claim described several ways in which each defendant carrier had fought to prevent competitors from entering the regional market it controlled. *Id.* at 566. The Court assumed the allegation was true, but held it was insufficient to raise a plausible inference that the carriers had unlawfully conspired with each other. *Id*. The Court explained that "resisting competition is routine market conduct." *Id*. Practically every business tries to prevent others from competing with it. *See id.* The fact that the defendant telephone carriers did what businesses always do, the

Court held, was not a plausible basis for inferring a conspiracy between them. *See id*.

The Court undertook a similar analysis in *Iqbal*. There the plaintiff, a Muslim Pakistani man arrested and detained after September 11th, claimed the Attorney General and the Director of the FBI "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin." *Iqbal*, 556 U.S. at 666. The majority stated that the only factual allegation supporting this claim of discrimination was that after September 11th, the FBI "arrested and detained thousands of Arab Muslim men." *Id.* at 681 (internal quotation marks omitted).[1] But this fact, the Court held, had an

[1] The plaintiff also pleaded that the defendants "knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest." *Iqbal*, 556 U.S. at 680 (internal quotation marks and brackets omitted). The majority concluded that this was not a factual allegation, but rather a "formulaic recitation of [an] element[] of" the plaintiff's "constitutional discrimination claim"—in other words, a mere legal conclusion. *Id.* at 681 (internal quotation marks omitted). Therefore, the majority held the allegation was not entitled to the assumption of truth, and did not consider it in determining whether the plaintiff's discrimination claim was plausible. *Id*.

This decision appears to conflict with the Supreme Court's decision in *Swierkiewicz v. Sorema N. A.*, which *Iqbal* did not purport to overrule. *See* 534 U.S. 506, 514 (2002) (accepting as true allegation that plaintiff's age and national origin were motivating factors in his termination). Indeed, four members of the Supreme Court would have held that the allegation of a discriminatory policy was a factual allegation entitled to the presumption of truth, *see Iqbal*, 556 U.S. at 695-96 (Souter, J. dissenting)—in which case, every member of the Court agreed, the plaintiff would have stated a plausible claim, *see id.* at 686, 695-96. Further, the Court in *Twombly* cited to *Swierkiewicz* approvingly and distinguished the

"obvious" explanation: It was, in the majority's view, entirely expected that a lawful search for those connected to Al Qaeda—a group largely composed of Arab Muslims—would disproportionately result in the arrests of people who were Arab or Muslim. *Id*. at 682.[2] Therefore, the fact that these disproportionate arrests occurred could not shed any light on whether the defendants acted illegally—they would have occurred regardless of whether the defendants discriminated. *Id*. And, as there were no other allegations suggesting illegal conduct, the Court held, the complaint had not plausibly stated a claim. *See id*.

The problem in both *Twombly* and *Iqbal* was that the plaintiffs' only factual allegations were facts that—in the majority's view—are virtually always going to be true regardless of illegal conduct by the defendants. Telephone companies are always going to try to fight competition. A search for people connected to an

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allegations at issue. *See Twombly*, 550 U.S. at 569-70 (rejecting argument that plausibility standard was contrary to *Swierkiewicz*); *see also McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 586 (4th Cir. 2015) (*Twombly* and *Iqbal* "did not overrule *Swierkiewicz*'s holding that a plaintiff need not plead the evidentiary standard for proving a Title VII claim"); *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 54 (1st Cir. 2013) ("the *Swierkiewicz* holding remains good law" in part because "the *Twombly* Court . . . cited *Swierkiewicz* with approval").

[2] As numerous scholars have pointed out, this assumption is highly problematic. *See, e.g.*, Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 Buff. L. Rev. 419, 423 (2010) (arguing that "the Court erred in finding unremarkable Iqbal's allegations that the government engaged in blanket racial profiling of Muslims and Arabs" and explaining that this assumption "is substantively problematic, particularly in consideration of *Korematsu v. United States*").

organization largely composed of Arab and Muslim people is always going to result in the arrest and detention of a disproportionate number of Arab and Muslim people. Because these facts are always true, nothing can plausibly be inferred from them. In other words, the Court in *Twombly* and *Iqbal* was not weighing competing inferences and determining which was more plausible, but instead determined that *no inference* could be drawn from the facts pled. This commonsense observation—that it would not be reasonable to infer illegal conduct from facts that are always going to be true—says nothing about cases where, as here, a plaintiff has pleaded facts from which the inference of illegal conduct can be drawn. *See In re U.S. Office of Pers. Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42, 57 (D.C. Cir. 2019) ("likely existence" of alternate explanation "hardly renders implausible" plaintiff's claim).

It is not always going to be true, for example, that a detective will encourage prosecution of an individual despite harboring serious and well-founded "doubts about whether [he] truly [is] the perpetrator," that he will do so while utterly failing to investigate obvious alternate suspects who the victim has previously identified by name, instead pursuing a suspect on the basis of a victim's dream-induced identification alone, or that he will then authorize the destruction of potentially-exonerating evidence when he has been alerted that that evidence had been "reentered into the Denver Police Department's Property Bureau to evaluate if

there was DNA present for analysis." JA2 219-20, 251, 312 (Compl. ¶¶ 10, 146, 394); Appellant Opening Br. at 29-33. And it is not always going to be true that a forensic scientist will misrepresent the scientific import of test results, claiming that a suspect cannot be excluded on the basis of a test when the state of the science and the analyst's own experience and prior testimony show that she is aware the results in fact indicate that it would be extremely unlikely for the suspect to be the perpetrator. JA2 240-47 (Compl. ¶¶ 97-119); Appellant Opening Br. at 27-29. More to the point—it is not always going to be true that each of these actors will undertake these actions with merely a negligent state of mind. Indeed, the district court itself found that it "is possible to infer from the alleged facts that Mr. Huff and Dr. Brown acted maliciously." JA6 at 1264. There is no "obvious" lawful explanation for Mr. Huff's and Dr. Brown-Dressel's actions in this case that would be equivalent to the "obvious" explanations for the facts alleged in *Twombly* and *Iqbal*.

The district court nevertheless dismissed Mr. Moses-EL's claims because, it found, he had not "dispel[led] the possibility" that Mr. Huff "acted with mere negligence," and that he had not pleaded "facts that establish a probability, not a possibility, that Dr. Brown acted with malice against him." JA4 at 855, 857. Contrary to the district court's contention, it cannot dismiss a plausible claim simply because a defendant can proffer an explanation that also is consistent with

the facts alleged. What the district court required of Mr. Moses-EL here was essentially that his claims be *more likely* than any alternative explanation—a requirement that, again, the Supreme Court has explicitly rejected. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556.

The Supreme Court did not dismiss the *Twombly* plaintiffs' complaint simply because the facts alleged—that telephone companies tried to keep competitors out—could have been the result of unilateral conduct. It dismissed the complaint because it is so common for businesses acting unilaterally to try to keep competitors out that knowing that the telephone companies did this did not make it any more likely that they acted illegally.

A hypothetical example may help clarify this distinction. Imagine Sally sues John for stealing her television. The only factual allegation Sally pleads to support her claim is that she saw a television at John's house. That fact is perfectly consistent with John stealing Sally's television, but it doesn't make Sally's claim any more plausible. Most people have televisions, so John having a television does not tell us anything. No inference can be drawn from this fact.

Now imagine that instead, Sally pleads that she saw *her* television at John's house. This allegation would render Sally's theft claim plausible. This is true even though there are plenty of possible lawful explanations for it. For example, John could contend that he bought the television at the local pawn shop. Sally's

allegation is "just as consistent" with John buying the television at the pawn shop as it is with John stealing it. It might even be more likely that John bought the TV than that he stole it—perhaps John frequently buys electronics at pawn shops. But under *Iqbal* and *Twombly*, Sally's claim may still proceed because it is *plausible* that the presence of her television at John's house leads to the inference that he stole it. Sally need not demonstrate that her claim is *more likely* than John's explanation—she need only show that it's plausible.

Twombly is like the first scenario: Alleging that companies conspired based solely on the fact that each company fought against possible competitors is like alleging that someone stole a TV based solely on the fact that they have one. Both facts are so common that they don't provide any relevant information. This case, on the other hand, is like the second scenario. Mr. Moses-EL's allegations as to the actions of Detective Huff and Dr. Brown-Dressel make it reasonable to infer illegal conduct, even if there are other possible—even likely—explanations. Indeed, the district court itself found as much. JA6 at 1264.

Any doubt remaining after *Twombly* that the plausibility standard does not require that a plaintiff's claims be more plausible than alternative explanations was resolved in *Tellabs Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007)—decided just one month after *Twombly*.

The issue in *Tellabs* was what constitutes a sufficient claim of illegal scienter for purposes of the Private Securities Litigation Reform Act. *Tellabs*, 551 U.S. at 313-14. That statute imposes a "super heightened" pleading standard upon securities fraud plaintiffs. *See id*. at 321; andré douglas pond cummings, *"Ain't No Glory in Pain": How the 1994 Republican Revolution and the Private Securities Litigation Reform Act Contributed to the Collapse of the United States Capital Markets*, 83 Neb. L. Rev. 979, 1008 (2005); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. Rev. 91, 156 n.67 (2007). Under the Act, securities fraud plaintiffs must plead facts that "giv[e] rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

The Court first explained that this standard is higher than the ordinary plausibility standard. *See Tellabs*, 551 U.S. at 314. It held that to "qualify as 'strong'" within the meaning of the statute, "an inference of scienter must be more than merely plausible or reasonable" as ordinarily required under the Federal Rules. *Id.* Rather, it must be "at least as compelling as any opposing inference of nonfraudulent intent." *Id*. And even under this heightened standard, the Court held, unlawful scienter need not be "the *most* plausible of competing inferences" that could be drawn from the alleged facts—it need only be *as plausible* as other

possible inferences. *Id*. at 314, 324 (emphasis added and internal quotation marks omitted).

It follows directly from *Tellabs* that the ordinary Rule 8 plausibility standard—which, again, is lower than that imposed by the Private Securities Litigation Reform Act—does not require a plaintiff's claim to be *more* plausible, or even *as* plausible, as other possible explanations for the facts alleged. *Tellabs* makes clear that *Twombly* means what it says: Claims subject to Rule 8—like those in this case—need only be plausible. Nothing more.

Most courts have adhered to this rule. *See, e.g.*, *Williams v. Dart*, No. 19-2108, 2020 WL 4217764, at *9 (7th Cir. July 23, 2020) ("*Iqbal* is not a mandate to weigh a plaintiff's likelihood of ultimate success at the pleading stage."); *Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 945 (6th Cir. 2020) (rejecting "'competing plausibility' analysis . . . at the motion-to-dismiss juncture"); *Hassan v. City of New York*, 804 F.3d 277, 297 (3d Cir. 2015) (as amended Feb. 2, 2016) (a complaint can only be dismissed based on an alternative explanation for the plaintiff's allegations if that explanation is "so convincing" that it would "render the plaintiff's explanation" implausible (internal quotation marks omitted)); *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the

plaintiff, both of which are plausible." (internal quotation marks and alterations omitted)); *Anderson News, LLC v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("A court … may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."); *Sepúlveda-Villarini v. Dep't of Educ. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss."); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) ("'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not."); *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (complaint survived motion to dismiss where inference that supported liability and inference that rebutted liability were both plausible); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party and would impose the sort of probability requirement at the pleading stage which *Iqbal* and *Twombly* explicitly reject." (internal quotation marks and citations omitted)).

There has, however, been some confusion. *See, e.g.*, *White v. Chevron Corp.*, 752 F. App'x 453, 454–55 (9th Cir. 2018) ("Where there are two possible

explanations, only one of which can be true and only one of which results in liability, . . . [s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, . . . in order to render plaintiffs' allegations plausible." (internal quotations and citations omitted)); *Blanchard v. Yates*, No. 06-cv-1841, 2009 WL 2460761, at *3 (E.D. Cal. July 27, 2009) (dismissing Eighth Amendment deliberate indifference claim because court found it "more likely" that a prison warden relied on the advice of medical professionals than that he was deliberately indifferent).

The decisions of this Court have, at times, contributed to that confusion. In *Phillips v. Bell*, 365 F. App'x 133 (10th Cir. 2010), for example, this Court assessed plaintiff Pamela Phillips's *Bivens* claims that federal officers had used recordings of telephone conversations between her and a man named Ronald Young in contravention of the Federal Wiretap Act. The recordings, allegedly made by Mr. Young, indicated that Ms. Phillips agreed to pay Mr. Young to murder her ex-husband. *Id*. at 135. Ms. Phillips's complaint alleged that Mr. Young made the recordings "specifically for the purpose of committing a criminal or tortious act"—which, if true, would bring the recordings outside the Act's "one-party consent" exception and make them illegal. *Id.* at 141. This Court found these allegations to be conclusory because they merely "provided a formulaic recitation of the elements" of Ms. Phillips's claim and offered "little in terms of factual

allegations." *Id*. (internal quotations and alterations omitted). This assessment of the plaintiff's allegations was likely correct, and was a sufficient basis on which to dismiss her claims. This Court, however, went further, stating that "more plausible reasons exist for Mr. Young making the recordings." *Id.* This statement has led at least one district court to conclude that this Circuit "embrace[s] a more restrictive interpretation" of Rule 8's pleading standard than *Twombly* and *Iqbal* require. *Escuadra v. Geovera Specialty Ins. Co.*, 739 F. Supp. 2d 967, 980 n.14 (E.D. Tex. 2010).

And this Court has oft repeated that a plaintiff whose allegations "are so general that they encompass a wide swath of conduct, much of it innocent," will have failed to "nudge[] their claims across the line from conceivable to plausible." *E.g.*, *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008); *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012). This broad statement, taken alone, leaves district courts susceptible to erroneous application of the standard. Which is precisely what happened here. Relying on this statement from *Khalik*, and ignoring this Court's accompanying admonishment that "'plausible' cannot mean 'likely to be true,'" *Robbins*, 519 F.3d at 1247, the district court here required Mr. Moses-EL to plead not just plausible claims, but claims that are *more plausible* than competing alternatives and that "dispel" other possibilities. This is

affirmatively not what the Supreme Court and drafters of the Federal Rules of Civil Procedure had in mind.

This Court, therefore, should clarify that while a complaint does not state a plausible claim if there is an "obvious" lawful explanation for the facts alleged such that it would be impossible to draw any inference about the defendant's conduct from those facts, where illegal conduct *can* plausibly be inferred from the facts alleged, district courts should not attempt to determine at the pleading stage whether a plaintiff's claim is more plausible than any other competing explanation. Simply stating a plausible claim, this Court should hold, is sufficient.

III. This Court should decline to impose a heightened pleading standard.

This Court should reject the district court's attempt to impose a heightened pleading standard that goes beyond what the Federal Rules require. Judges in this Circuit need not—and should not—require plaintiffs to dispel the possibility of all other potential inferences that can be drawn from their allegations. To the contrary, requiring judges to do more than determine whether a plaintiff's claim is plausible would force them to make decisions at the pleading stage that they lack sufficient information to make, inevitably causing the dismissal of meritorious claims—without any attendant benefit in weeding out frivolous lawsuits.

Empirical research demonstrates that it is very difficult for courts to evaluate the merits of a case at the pleading stage. Unsurprisingly, decisions based on such

limited information are both less reliable and more vulnerable to the impact of cognitive biases than decisions based on more robust evidence. *See, e.g.*, Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DePaul L. Rev. 413 (2011). They are, therefore, more likely to be wrong. *See id.*[3]

Indeed, while *Twombly* and *Iqbal* increased the frequency with which cases are dismissed, they did not increase the quality of cases that survive. *See, e.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117, 2162-64 (2015) (demonstrating that while cases were more likely to be dismissed in 2010 (after *Twombly* and *Iqbal*) than in 2006 (before *Twombly* and *Iqbal*), there was "no obvious improvement in the success of [the] lawsuits" that

[3] In addition, fewer and fewer claims are being resolved on the merits in court, which means judges have less and less experience to draw upon to evaluate whether a complaint is likely to turn out to be meritorious. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 464 fig. 1 (2004) (showing that the number of civil trials across all U.S. district courts dropped from more than 12,000 per year in the 1980s to fewer than 5,000 in 2002); Thomas J. Stipanowich, *Arbitration: The "New Litigation*," 2010 U. Ill. L. Rev. 1, 9-11 (2010) (reviewing the expansion of arbitration in the twentieth century). And the prevalence of confidential discovery and sealed settlements makes it even more difficult for judges to evaluate complaints. Andrew D. Goldstein, *Sealing And Revealing: Rethinking The Rules Governing Public Access To Information Generated Through Litigation*, 81 Chi.-Kent L. Rev. 375, 402-03 (2006) (arguing that publicly available discovery has the potential to verify allegations of wrongdoing); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 Mich. L. Rev. 867, 869 (2007) (noting that public settlements are the exception and explaining that examining settlements in similar previous cases makes it easier to estimate the value of a plaintiff's claims).

survived dismissal); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119, 127 (2011) (demonstrating that "thin pleading does not correlate with lack of merit"); *see also* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. Econ. & Org. 598, 600 (2007) (suggesting that the even higher standard of the Private Securities Litigation Reform Act has a similar problem).

This is not to say that dismissal has been entirely random. Since *Iqbal*, civil rights and employment discrimination cases have seen a greater increase in dismissals than other cases. *See, e.g.*, Reinert, *Measuring the Impact*, *supra*, at 2157; Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. Rich. L. Rev. 603, 603 (2012). So too have cases brought by individuals, rather than corporate or government plaintiffs. *See* Reinert, *Measuring the Impact*, *supra*, at 2157.

These findings are unsurprising. Individuals are likely to have fewer resources to devote to investigating a lawsuit and drafting a robust complaint than corporations or the government. In many cases, there is an informational asymmetry between the parties, such that critical evidence needed to prove—or even plausibly allege—a plaintiff's claim is in the hands of the defendants. *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 Mich. L. Rev. 1, 28 (2009). This is particularly problematic in cases where "subjective motivations or

concealed conditions or activities are key to establishing liability," such as civil rights cases, employment discrimination cases, and antitrust cases. *Id.*; *see* Rakesh N. Kilaru, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 Stan. L. Rev. 905, 909 (2010) (describing the problem as a "classic Catch-22").

Thus, the advent of plausibility pleading has not had the intended result of filtering out meritless cases. Rather, it seems to disproportionately filter out public law cases brought by individuals, regardless of merit. Further heightening the pleading standards—as the district court's order here would do—will only exacerbate this problem.

Seventh Circuit Judge David Hamilton dramatically illustrated the danger of an overly aggressive reading of *Iqbal* and *Twombly* by examining the complaint in *Brown v. Board of Education*, 347 U.S. 483 (1954). *McCauley v. City of Chicago*, 671 F.3d 611, 626-627 (7th Cir. 2011) (Hamilton, J., dissenting in part). The key paragraph of the complaint alleged:

> The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The respects in which these opportunities are inferior include the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka. Apart from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational

> opportunity offered to Negroes, when compared to educational opportunity offered to whites.

Id. at 626-27 (internal quotation marks omitted).

As Judge Hamilton suggests, a strong argument could be made that the first and third sentences are bare legal conclusions that should be disregarded under *Iqbal*. *Id.* at 627. This leaves only the middle sentence.

Accepting as true the remaining allegation that "the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors" offered to black students were "inferior" than those offered to white students, some judges might think that other possible explanations for the facts alleged were more plausible. *See McCauley*, 671 F.3d at 626-27. For example, a judge might believe that "[d]isparity in outcome is just as consistent with the natural effects of lower socio-economic status as it is with pernicious effects of racial segregation." *See id*. If courts were permitted to dismiss plausible claims simply because they were not—in the judge's view—more plausible than alternative explanations, a judge could easily dismiss *Brown*'s claim of race discrimination on the basis that socioeconomic differences, not racial segregation, was the most plausible explanation for the facts alleged. *See id*.

That cannot be the result the Supreme Court intended. This Court should minimize the risk that a meritorious case like *Brown* will be dismissed at the pleading stage in this Circuit.

CONCLUSION

For the foregoing reasons, and those stated by the Appellant in his Opening Brief, this Court should reverse the district court's order dismissing Mr. Moses-EL's Amended Complaint.

DATED: August 17, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6,470 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Date: August 17, 2020

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing document:

(a) all required privacy redactions have been made per 10th Cir. R. 25.5;

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Date: August 17, 2020

s/Stephanie K. Glaberson
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020 I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to all parties that have appeared.

Date: August 17, 2020

s/Stephanie K. Glaberson
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APPENDIX: DESCRIPTIONS OF INDIVIDUAL *AMICI CURIAE*

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, and to ensure that everyone can fully and independently participate in our nation's civic life without discrimination based on race, gender, disability, religion, national origin, age, sexual orientation, or gender identity. CREEC also works to protect the legal and constitutional rights of detained and incarcerated individuals. CREEC's members and clients are often marginalized, impoverished, and/or detained, ensuring that they are at a deep informational disadvantage in contrast to the corporate and governmental entities whose conduct we challenge. The principles enunciated in this brief are crucial to ensuring our members' and clients' access to justice.

The Colorado Cross-Disability Coalition ("CCDC") is a Section 501(c)(3) non-profit organization dedicated to promoting social justice and combining individual and systemic advocacy as effective agents for change that can benefit people with all types of disabilities. CCDC—primarily led and staffed by people with disabilities—has developed a strong reputation for empowering people with the most significant disabilities to advocate for themselves and for others in difficult situations. CCDC promotes self-reliance and full participation by people with disabilities and their friends and family members through organizing,

advocacy, education, legal initiatives, litigation training and consulting, policy development, and legislation. CCDC is viewed as a national model of how a disability rights organization—linking the talents and dedication of people with all types of disabilities and their non-disabled families, friends, and allies—can keep true to its grassroots mission while gaining expertise and increasing the power of people with disabilities to participate effectively in the larger community. The CCDC Civil Rights Legal Program has been very involved with litigation under each of the federal laws protecting the rights of individuals with disabilities, and is very concerned that the heightened pleading standard set forth by the lower court in this case will make the "short and plain statement" requirement of Federal Rules of Civil Procedure 8 virtually impossible to meet.

The **Colorado Plaintiffs Employment Lawyers Association (PELA)** is Colorado's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving employment civil rights violations. PELA works to increase public awareness of the rights of individual employees and workplace fairness and is dedicated to preserving laws that protect workers from unfair labor practices and safeguarding the due process rights of public employees. PELA's membership includes attorneys who represent employees in Federal court under a variety of statutes protecting individuals from discrimination, harassment, retaliation, and the failure to pay proper compensation.

Consequently, PELA has a strong interest in ensuring access to courts for the victims of unlawful employment conduct, which requires reasonable pleading standards.

Disability Rights Advocates (DRA) is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

NELA: Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights plaintiffs' attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in labor, employment, wage and hour, and civil rights disputes. NELA has a particular interest in ensuring that plaintiffs are not unduly burdened by pleading standards that effectively bar access to the courtroom.

The Employee Rights Advocacy Institute For Law & Policy ("The Institute"), NELA's public interest sister organization, advances workers' rights

through research, thought leadership, and education for policymakers, advocates, and the public. The Institute is a thought leader in issues surrounding access to justice, including ending forced arbitration, and has a particular interest in advancing pleading standards that uphold plaintiffs' access to the courts.

Public Justice is a national public interest law firm dedicated to pursuing justice for victims of corporate and government wrongdoing. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that courthouse doors remain open to all injured plaintiffs with meritorious claims. As part of its access-to-justice work, Public Justice created an *Iqbal* Project in 2009 to, among other things, track developments in the law regarding pleading, educate practitioners about the proper application of the Rule 8 pleading standard, and provide assistance to counsel facing motions to dismiss based on the Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Public Justice has also itself represented clients facing such motions and has appeared as amicus curiae in numerous cases addressing disputes about sufficient pleading.